SANITARY LEGISLATION.

COURT DECISIONS.

KANSAS SUPREME COURT.

Health Officer—Civil Service Appointment—Wrong Person Certified Because of Error—Appointment Held Legal.

McLAUGHLIN *v.* GREEN et al., 152 Pac. Rep., 661. (Nov. 6, 1915.)

Under the laws of Kansas a city health commissioner can be removed from office before the expiration of his term only upon charges preferred in writing for misconduct or failure to perform his duty.

An appointment made in good faith upon certification by the civil service commission is valid even though the wrong person was certified because of a mistake.

A city health commissioner was appointed after competitive examination and certification by the city civil service commission. The civil service commission then discovered that an error had been made in totaling the grades of the papers, and that the person certified and appointed had not secured a rating sufficiently high to entitle him to certification. The court decided that the appointment had been made in compliance with the statute and was therefore legal, notwithstanding the mistake.

MARSHALL, J.: This is an appeal from a judgment granting a peremptory writ of mandamus. On April 2, 1914, a vacancy existed in the office of the health commissioner of Kansas City, and an examination was held under chapter 88 of the laws of 1913, by the civil service commission of that city, to determine the qualifications and fitness of applicants for the position. The papers were sent to Dr. S. J. Crumbine, secretary of the State board of health, for marking and rating. He reported back that Dr. C. C. Nesselrode stood first, and Dr. C. W. McLaughlin second. April 28, 1914, before a certificate showing the result of the examination was made to the city board of commissioners, the plaintiff was appointed to the office. May 2, 1914, a proper certificate was sent to the commissioners, and the same day the appointment was regularly made. The plaintiff then entered upon the duties of the office, and performed those duties until May 6, 1915. On July 9, 1914, the civil service commission sent a communication to the board of commissioners stating that a mistake had been made in totaling the grades on the examination of the applicants for the position, and on July 20, 1914, sent a corrected certificate, showing that Dr. Tenney and Dr. Nesselrode were the two highest on the list and should have been certified to the commissioners, to the exclusion of Dr. McLaughlin. After laying the matter over from time to time, the commissioners, on August 28, refused to allow the plaintiff any further salary. May 6, 1915, after the decision in the case of Haney *v.* Cofran (94 Kan. 332, 146 Pac. 1027), the board of commissioners terminated the controversy by an order ousting the plaintiff. On May 26 an alternative writ of mandamus was issued out of the district court of Wyandotte County to compel the board of commissioners to revoke the order removing the plaintiff from the office, and to recognize him as health commissioner of the city.

The defendants present two propositions: First, that the position of health commissioner is an office and the incumbent thereof an officer within the meaning of sec-

tion 2, article 15, of the State constitution; that having been appointed under section 13, chapter 88, of the laws of 1913, and no tenure being fixed, he held at the will of the appointing power; second, that, never having been entitled to certification, the plaintiff was ineligible at the time of his appointment, the order of appointment was a nullity, and the board of commissioners could declare the office vacant.

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After the act of 1915 took effect, the plaintiff could be removed only upon charges preferred in writing for misconduct or failure to perform his duty. He was not removed in that manner. The defendants refused to allow the plaintiff the salary for the services rendered by him after August 28, 1914. This had no effect on his right to that salary, and did not determine whether or not he had been legally appointed, and was not a removal of the plaintiff from the office then held by him.

Section 13, chapter 88, of the laws of 1913 places all officers and employees of cities under civil service rules and regulations, except certain ones therein named. The position of health commissioner, created by a city ordinance, is not one of those excepted in the statute, and is therefore subject to the civil service law. Section 5, chapter 88, of the laws of 1913 reads as follows:

> The civil service commission shall, whenever it is necessary so to do, under such rules and regulations as it may prescribe, hold examinations for the purpose of determining the qualifications and fitness of applicants for all positions with the city subject to examination as hereinafter defined, which examination shall be practical and shall fairly test the fitness of the persons examined to discharge the position to which they seek to be appointed.

Section 7 reads:

> The civil service commission shall certify to the board of commissioners the names and addresses of double the number of applicants for each vacancy, standing highest upon the eligible list of the class or grade to which said position belongs, and the board of commissioners shall make appointments from such list so certified and not otherwise; provided, however, that whenever the eligible list of the civil service commission contains less than double the number of applicants to fill the vacancy or vacancies existing, the board of commissioners shall appoint the person or persons then available on said eligible list.

An examination was held under the law. A certificate was given to the board of commissioners, and those commissioners appointed the plaintiff under that certificate. There was nothing to indicate that the appointment was invalid for any reason. There was nothing left to be done to make a legal appointment. A mistake was made by the civil service commission, by which the plaintiff's name was improperly placed on the certificate. The board of commissioners was bound by that certificate. A court, unless it be in proceedings in quo warranto, can not inquire into the validity of that appointment, nor correct the mistakes made by the civil service commission while acting in good faith. In People ex rel. Mullen *v.* Sheffield (24 App. Div. 214, 217, 48 N. Y. Supp. 796, 798), the court used this language:

> When such a report is made by the proper board to the appointing officer, and such appointing officer acts upon such report, the appointment then becomes a valid appointment, and the person appointed becomes vested with the office to which he has been appointed. It is quite apparent that it would destroy the whole system of competitive examinations if the appointing officer would have a right to go beyond the report of the board and to refuse to accept it, on the ground that the eligible list, as presented by those upon whom the responsibility rests of determining who should be upon such eligible list, had not complied with the provisions of the statute in making up such list.

In People *v.* Lindblom (182 Ill. 241, 55 N. E. 358), the Supreme Court of that State said:

> A certification of a person by the civil service commission can not be set aside and another person placed in his stead by the common-law writ of certiorari. Syl. par. 1.

See also Matter of Allaire *v.* Knox (62 App. Div. 29, 70 N. Y. Supp. 845), affirmed in 168 N. Y. 642, 61 N. E. 1127; People ex rel. Braisted *v.* McCooey (100 App. Div. 240,

91 N. Y. Supp. 436). In People ex rel. Schau *v.* McWilliams (185 N. Y. 92, 101, 77 N. E. 785, 787), the court said:

> If the action of the [civil service] commission is not palpably illegal, the court should not intervene.

See also Darling *v.* Maguire (70 Misc. Rep. 597, 129 N. Y. Supp. 385, 386).

We must conclude that the appointment of the plaintiff was in compliance with the statutes, and that it is therefore legal, notwithstanding the mistake made by the civil service commission in giving the plaintiff his markings on the examination. It necessarily follows that the plaintiff is legally health commissioner of Kansas City, and the judgment of the district court is therefore affirmed. All the justices concurring.

NEW YORK SUPREME COURT—APPELLATE DIVISION—THIRD DEPARTMENT.

Ivy Poisoning—Compensation Awarded to Workman's Widow for Death Resulting Indirectly from Poison Ivy.

PLASS *v.* CENTRAL NEW ENGLAND RY. CO., 155 N. Y. Supp., 854. (Nov. 10, 1915.)

Death resulting from "blood poisoning" and "congestion of the lungs" following contact with poison ivy is accidental within the meaning of the New York workmen's compensation law.

A workman, while mowing grass, came in contact with poison ivy. He became ill, "blood poisoning" developed, he contracted "congestion of the lungs," and death followed. The New York workmen's compensation commission awarded compensation to his widow, and the court affirmed the award.

JOHN M. KELLOGG, J.: Plass was a section laborer, and, as such, in the course of his employment, was mowing the right of way of the appellant's railway. This was done every year, and the men were engaged several days in performing that duty. The object in mowing the grass was for the safety of the bridges, the adjoining properties, to keep fires from spreading, and to prevent the grass coming up on the tracks, thus causing the engines to slip. In the grass was growing poison ivy and other weeds, and while mowing Plass came in contact with the ivy and was poisoned, became sick and confined to his bed, resulting in blood poisoning, where he contracted congestion of the lungs, from which he died August 29, 1914. The remote cause of his death was the ivy and septic poisoning, and the immediate cause of his death was acute congestion of the lungs, to which his poisoned condition predisposed him. Such are the findings of the commission.

It has been held that contact with poison ivy which results in death is an accidental death within a policy covering death by external, violent, and accidental means. Railway Ass'n *v.* Dent, 213 Fed. 981, 130, C. C. A. 387, L. R. A. 1915A, 314. The injury can not be called an occupational disease. Plass actually, inadvertently, came in physical contact with poison ivy. The poison to his system caused thereby resulted in his sickness, and reduced his power of resistance, and made him susceptible to bronchitis. The attending physician treated him for ivy poisoning, and then found he had developed more or less infection, the blebs breaking open, and in that way he became infected, and while in bed contracted bronchitis, which afterward developed œdema of the lungs, and he died quite suddenly.

The commission has found that the ivy and septic poisoning was the remote cause of his death, and that his poisoned condition predisposed him to the acute congestion of the lungs of which he died. We are not at liberty to review the findings of the commission upon a question of fact. There is certainly some evidence to warrant the finding.

The award is therefore confirmed. All concur.